**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MISSOURI**

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| ARKANSAS TEACHER RETIREMENT SYSTEM, Individually and on Behalf of All Others Similarly Situated,<br><br>Plaintiff,<br><br>v.<br><br>MONSANTO COMPANY, HUGH M. GRANT, TERRELL K. CREWS, CARL M. CASALE, and BRETT D. BEGEMANN,<br><br>Defendants. | : | Case No. 4:10cv1380 CDP |

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS**

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**PRELIMINARY STATEMENT**

Lead plaintiff Arkansas Teacher Retirement System filed an Amended Complaint on January 31, 2011. Seeking to represent an alleged class of purchasers of Monsanto Company common stock and debt securities during the period between January 7, 2009 and May 27, 2010 (the "Class Period"), Plaintiff alleges that Monsanto and four of its current or former senior executives violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934. Plaintiff claims that over the 16-month Class Period, Defendants "knowingly or severely recklessly" made false and misleading statements regarding Monsanto's anticipated future performance in a series of earnings projections relating to the Company's fiscal years 2009 through 2012.

This case is a textbook example of "fraud by hindsight," the all-too-common practice of accusing a highly reputable public company and its executives of securities fraud because their earnings forecasts in a volatile economic period did not come to pass. Plaintiff challenges some 73 statements made by Monsanto and the Individual Defendants over the 16-month Class Period, claiming—with the benefit of hindsight—that all of Monsanto's forecasts were too rosy and that it should have foreseen from the outset that they were unattainable.

Private securities fraud actions can "abusively . . . impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). So Congress in 1995 enacted the Private Securities Litigation Reform Act. To encourage companies to disclose their projections, the Reform Act established a "safe harbor" for forward-looking statements that are "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement." 15 U.S.C. § 78u-5(c)(1)(A)(i). It also established heightened pleading requirements, mandating that securities-fraud complaints specify each false statement or misleading omission, explain why the omission was misleading, and state with particularity facts giving rise to a "strong inference" that the defendant acted with the scienter required for the cause of action. 15 U.S.C. §§ 78u-4(b)(1), (2).

The Complaint must be dismissed. *First*, nearly every statement at issue was a forecast of earnings per share or gross profit for Monsanto or one of its businesses and, therefore, constituted a "forward-looking statement" under the Reform Act. Because each "forward-looking statement" was identified as such and accompanied by "meaningful cautionary statements," all are *per se* non-actionable under the Reform Act's safe harbor. *See* Point I.A., *infra*. For essentially the same reasons, the forecasts are immunized under the "bespeaks caution" doctrine, a common-law progenitor of the safe harbor. *See* Point I.B., *infra*.

*Second*, to satisfy the Reform Act, a securities-fraud complaint must show specifically why the disputed statements were false or misleading when made. When the claim pertains to a company's forecasts, the plaintiff must plead facts demonstrating that the forecasts were "necessarily unattainable." *In re Cerner Corp. Sec. Litig.*, 425 F.3d 1079, 1083–84, 1086 (8th Cir. 2005). The Complaint fails to do so. Moreover, many of the allegedly undisclosed facts were, in fact, disclosed. *See* Point II, *infra*.

*Third*, many of the statements Plaintiff challenges were vague statements of corporate optimism. For example, Monsanto's statements that it expected to show "solid growth" and believed it was "on track" to meet projections (*see, e.g.*, AC ¶¶ 114, 124), are "'precisely the type of puffery that this and other circuits have consistently held to be inactionable.'" *Parnes* v. *Gateway 2000*, 122 F.3d 539, 547 (8th Cir. 1997). *See* Point III, *infra.*

*Fourth*, the Complaint fails to meet the Reform Act's heightened standard for pleading scienter. Plaintiff does not claim that any of the Defendants had a motive to commit securities fraud. Plaintiff instead tries to demonstrate the requisite "strong inference" of scienter by alleging that Defendants supposedly "knew or were severely reckless in disregarding" that Monsanto's forecasts were false. *See, e.g.*, AC ¶ 261. But the Reform Act imposes an "actual knowledge" standard for forward-looking statements, and the Complaint fails to allege facts showing Defendants actually knew any of their statements was "necessarily false." Plaintiff's scienter allegations are neither strong nor cogent, and the opposing inferences of nonfraudulent intent are far more compelling. *See* Point IV, *infra*.

## BACKGROUND[1]

### A. The parties

Arkansas Teacher Retirement System, a state employee pension fund, is the "lead plaintiff" under this Court's November 1, 2010 Order. AC ¶ 5.

Monsanto is a leading global provider of agricultural products for farmers. AC ¶ 21. The Individual Defendants are present and former officers of Monsanto. AC ¶¶ 7–11. Monsanto manages its business in two segments: (1) Seeds and Genomics; and (2) Agricultural Productivity. Seeds and Genomics produces leading seed brands and develops biotechnology traits that assist farmers in controlling insects and weeds. AC ¶¶ 22, 26. Agricultural Productivity manufactures *Roundup*, the leading branded glyphosate-based herbicide, and other

[1] The Court is not limited to the Complaint's allegations, which frequently omit salient portions of Monsanto's public disclosures. *See* 15 U.S.C. § 78u-5(e) ("On any motion to dismiss based upon [the safe harbor provision of the Reform Act], the court shall consider any statement cited in the complaint and any cautionary statement accompanying the forward-looking statement, which are not subject to material dispute, cited by the defendant."); *Tellabs*, 551 U.S. at 322 (on motion to dismiss under Reform Act, courts "ordinarily examine . . . documents incorporated into the complaint by reference, and matters of which a court may take judicial notice"); *Kushner* v. *Beverly Enters.*, 317 F.3d 820, 831 (8th Cir. 2003) (on motion to dismiss securities fraud claim, court may consider "'documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading'"). Copies of such documents are annexed as exhibits to the Declaration of Jonathon R. La Chapelle, sworn to March 31, 2011 and cited herein as "Ex. __."

products including generic glyphosate-based herbicides.[2] The patents protecting glyphosate expired long ago, and *Roundup* competes against other branded as well as generic glyphosate-based herbicides. AC ¶ 22. For the most part, Monsanto sells its products through third-party retailers that, in turn, sell them to farmers. AC ¶ 26.

**B. Monsanto's business prior to the Class Period**

From 2003 to 2007, Monsanto enjoyed robust profits. Seeds and Genomics grew far faster than Agricultural Productivity. For the fiscal year ended August 31, 2007,[3] Monsanto had $3 billion gross profit from Seeds and Genomics, and $1.2 billion from Agricultural Productivity ($854 million of which was from *Roundup*/glyphosate). Ex. 2 at 25–27, 31–33.

In November 2007, Monsanto announced a five-year plan to double gross profit by fiscal 2012. AC ¶ 29. It predicted this growth would come principally from Seeds and Genomics, which it forecasted to grow to between $6.5 and $7 billion in 2012. Gross profit from *Roundup*/glyphosate was predicted to grow to $1.2 billion.

At first, Monsanto made great strides towards this goal. In fiscal 2008, it reported gross profits of $6.177 billion—a 46% increase over 2007. *Roundup*/glyphosate had spectacular results, with $1.976 billion gross profit—a 131% increase—as worldwide demand for glyphosate outstripped supply and prices jumped. Seeds and Genomics gross profit grew 28% to $3.857 billion—the fifth year in a row of 20%-plus growth for the segment. Ex. 2 at 22–27.

In October 2008, the Company predicted gross profits for fiscal 2009 of $4.5 to $4.6 billion for Seeds and Genomics and $2.3 to $2.4 billion for *Roundup*/glyphosate. Defendant

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[2] Agricultural Productivity also sells a smaller product-line, called selective herbicides, which are not glyphosate-based and, even prior to the Class Period, faced "competitive pressures and a declining market." Ex. 2 at 37.

[3] Throughout the relevant period, Monsanto's fiscal years ended on August 31. Its first quarter ended on November 30, its second quarter on February 28, and its third quarter on May 31. Ex. 3; Ex. 4; Ex. 5; Ex. 34.

Crews, then Monsanto's Chief Financial Officer, stated on an October 8, 2008 earnings call that Monsanto anticipated a "tough competitive environment" for *Roundup*/glyphosate as Chinese manufacturers (the principal competition) would supply increased amounts of generic glyphosate at a lower price. But Monsanto believed demand for *Roundup* would "remain strong" and the business's profitability would increase in fiscal 2009 because the Chinese cost of production was roughly one-third higher than Monsanto's. AC ¶¶ 37–38; Ex. 6 at 4–5.[4]

Consistent with its projections, Monsanto's *Roundup*/glyphosate business excelled in first quarter fiscal 2009. Gross profit rose to $804 million, a 65% increase over first quarter 2008. It is at that point, according to the Complaint, that Monsanto should have predicted the bottom was about to fall out of its long-profitable *Roundup*/glyphosate business—and Monsanto and its officers committed "securities fraud" by failing to do so.

**C. Monsanto's business during the Class Period**

On January 7, 2009, the date on which Monsanto announced its first-quarter 2009 results, it raised its ongoing earnings-per-share ("ongoing EPS") guidance for the year from a range of $4.20 to $4.40 to a range of $4.40 to $4.50. Monsanto projected gross profit in the *Roundup*/glyphosate business of $2.4 to $2.5 billion for the year, but predicted it would fall to $1.9 billion in 2012. AC ¶ 110; Ex. 7 at 1; Ex. 8 at 5; Ex. 9 at 6, 9, 26.

Although it goes totally unmentioned in Plaintiff's 279-paragraph Complaint, Monsanto ultimately *met* that fiscal 2009 ongoing EPS guidance, reporting earnings of $4.41 per

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4 Crews noted that: (i) raw materials comprised 75% of the cost of producing generic glyphosate, and these costs were 25% to 70% higher than their historical lows; (ii) in June 2007, China cut its export tax supports for glyphosate in half and gave no indication of changing course; (iii) the Chinese producers' environmental cost controls were on the rise, with new facilities incurring 15% higher costs to incorporate such controls; and (iv) the Chinese producers' profit margins remained higher than historical levels, as they now appeared focused on earning a return on their investment rather than selling glyphosate for export in order to generate hard currency. Ex. 6 at 4–5.

share due to stronger-than-predicted performance in Seeds and Genomics. Ex. 10 at 2. *Roundup*/glyphosate was a different story. As it turned out, fierce price competition from Chinese generic glyphosate manufacturers and other branded competitors steadily drove down the profitability of Monsanto's *Roundup* and glyphosate business. A business that had generated $1.976 billion in gross profit in fiscal 2008—and $804 million for *first-quarter* fiscal 2009 alone—became a business that, by May 2010, was expected to generate only $250–$300 million per year on an ongoing basis.

Throughout this period, as the following chart demonstrates, Monsanto and its officers repeatedly lowered the Company's glyphosate gross-profit forecasts in response to this extraordinary market pressure:

| **FORECAST DATE** | **ACTUAL *ROUNDUP*/ GLYPHOSATE GROSS PROFIT** | **FISCAL YEAR 2009 FORECAST** | **FISCAL YEAR 2010 FORECAST** | **FISCAL YEAR 2012 FORECAST** |
|---|---|---|---|---|
| January 7, 2009 | $804 million through first quarter 2009 | $2.4 billion to $2.5 billion | N.A. | $1.9 billion |
| April 2, 2009 | $1.241 billion through second quarter 2009 | $2.4 billion | N.A. | $1.9 billion |
| May 27, 2009 | N.A. | $2.0 billion | N.A. | "Smaller" than $1.9 billion |
| June 24, 2009 | $1.514 billion through third quarter 2009 | $2.0 billion | N.A. | $1.0 billion |
| September 10, 2009 | N.A. | N.A. | $650 million to $750 million | $1.0 billion |
| October 7, 2009 | $1.836 billion for fiscal year 2009 | N.A. | $650 million to $750 million | $1.0 billion |
| November 10, 2009 | N.A. | N.A. | $650 million to $750 million | $1.0 billion |
| January 6, 2010 | $87 million through first quarter 2010 | N.A. | $650 million to $750 million | $1.0 billion |
| April 7, 2010 | $86 million through second quarter 2010 | N.A. | $600 million "plus or minus" | N.A. |
| May 27, 2010 | N.A. | N.A. | $50 million to $200 million | $250 million to $300 million |

The gravamen of the Complaint is that Defendants "belatedly reveal[ed] to investors the true state of Monsanto's business" on May 27, 2010 when, as noted above, the final reduction to the *Roundup*/glyphosate forecasts was made. But in fiscal 2009, the *Roundup* business made over $1.8 billion gross profit; indeed, fiscal 2009 was the *second-best* year ever for *Roundup*, just 7% less than its 2008 record. Thus, for much of the "Class Period," the "true state" of Monsanto's *Roundup* business was highly profitable. And as noted, Monsanto's *overall* fiscal-2009 results met the ongoing EPS guidance given at the outset of the Class Period.

Eventually, as the chart reflects, the fierce below-cost selling by Monsanto's competitors took its toll. But inaccurate forecasting is not securities fraud. And Plaintiff's fanciful notion that Defendants foresaw *Roundup*'s collapse before the Class Period—but waited until it was complete before "belatedly reveal[ing] to investors the true state of Monsanto's business"—is belied by the full text of Monsanto's disclosures. As Monsanto revised its forecasts, it repeatedly alerted investors to the deteriorating market conditions. In each instance, Monsanto warned investors that actual results could be worse than forecast due to many factors.

In tacit recognition that its *Roundup* case cannot survive, Plaintiff interjects into the case for the first time a Seeds and Genomics claim.[5] This claim is also premised on forward-looking statements, principally relating to the anticipated acreage to be sold in the launches of two new products—*Roundup Ready 2 Yield* ("*RR2Y*") soybeans and *SmartStax* corn. As shown below, these new makeweight claims fail under the Reform Act's safe harbor and its heightened pleading standards for falsity and scienter.

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[5] As the Court may recall, the initial complaint in this action filed by Rochester Laborers Pension Fund made only glyphosate-related claims. *See* Dkt. # 1. When Arkansas Teacher Retirement System sought to be appointed lead plaintiff, its motion papers likewise made no mention of any Seeds and Genomics claims. *See* Dkt. # 32.

## POINT I

## DISMISSAL IS REQUIRED BY THE SAFE HARBOR PROVISION OF THE REFORM ACT AND THE BESPEAKS CAUTION DOCTRINE.

### A. Monsanto's forecasts are protected by the statutory safe harbor.

Virtually every one of the 73 statements at issue here is forward-looking under the Reform Act. Because these statements were identified as such, and were accompanied by "meaningful cautionary language," they fall within the statutory safe harbor.

In enacting the safe harbor, Congress recognized that "[f]ear that inaccurate projections will trigger the filing of securities class action lawsuit[s]" had "muzzled corporate management," H.R. Conf. Rep. 104-369, at 43 (1995), and sought to encourage disclosure of forward-looking information without the threat of lawsuits like this one. *See Harris* v. *Ivax Corp.*, 182 F.3d 799, 806 (11th Cir. 1999). The safe harbor explicitly protects "forward-looking statement[s]," defined to include "statement[s] containing a projection of revenues, income (including income loss), earnings (including earnings loss) per share," "statement[s] of future economic performance," and the "assumptions underlying or relating" to such statements. 15 U.S.C. §§ 78u-5(i)(1)(A), (C), (D). Such statements are not actionable if: (A) they are identified as such and either are "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement" or are "immaterial;" *or* (B) plaintiff fails to prove that the statements were made with "actual knowledge" that they were false or misleading. 15 U.S.C. § 78u-5(c)(1).

Under the safe harbor's first prong, "a forward-looking statement is protected if it is immaterial or identified as forward-looking and accompanied by meaningful cautionary language, *regardless of whether the speaker knows the statement is false*." *Western Washington Laborers-Employers* v. *Panera Bread*, 697 F. Supp. 2d 1081, 1089 (E.D. Mo. 2010) (emphasis added). If a forward-looking "statement is accompanied by 'meaningful cautionary language,' the defendants' state of mind is irrelevant." *Harris*, 182 F.3d at 803.

Under the safe harbor, federal courts routinely dismiss Section 10(b) claims based on allegedly false forecasts where, as here, the forecasts were accompanied by cautionary language identifying factors that could cause actual results to differ materially from the forecasts. *See, e.g.*, *Panera*, 697 F. Supp. 2d at 1093; *Yellen* v. *Hake*, 437 F. Supp. 2d 941, 968 (S.D. Iowa 2006). The "meaningful cautionary language" may either appear in the press release or other document at issue or the latter may "incorporate by reference" the cautionary language contained in SEC filings. *See, e.g.*, *Panera*, 697 F. Supp. 2d at 1090 ("courts considering the issue seem to uniformly conclude that it is permissible" to incorporate forward-looking statements "by reference"); *Yellen*, 437 F. Supp. 2d at 963–64 (collecting cases).

The Complaint attempts to avoid the safe harbor by alleging in conclusory fashion "that Defendants made materially false and misleading statements or omitted material facts concerning historical or current facts and conditions at the time the statements were made." AC ¶ 246. But Plaintiff's characterization of a statement as "historical" or "current" does not matter; it is for the Court to determine whether a statement is forward-looking, and it can do so as a matter of law. *Panera*, 697 F. Supp. 2d at 1088–89. Even present-tense statements are forward-looking when they "do[] not make any specific, verifiable representation about the present state of affairs." *Id.* at 1094. *See also Harris*, 182 F.3d at 807 ("[W]hen the factors underlying a projection or economic forecast include both assumptions and statements of known fact, and a plaintiff alleges that a material factor is missing, the entire list of factors is treated as a forward-looking statement."); *Institutional Investors* v. *Avaya, Inc.*, 564 F.3d 242, 254–56 (3d Cir. 2009) (statements that company "on track to meet [its] goals for the year" and results "position[ed]" company to meet its goals were forward-looking as they "amount[ed] in essence to a reaffirmation" of earlier projection); *Harris*, 182 F.3d at 804–06 (statement that "we expect" reserves to be above typical quarters was forward-looking); *Panera*, 697 F. Supp. 2d at 1094 (statement that product roll-out "going exactly as our research . . . indicated" was forward-looking); *Yellen*, 437 F. Supp. 2d at 960–61 (statement that company "reaffirmed plans to achieve improved earnings" that were "expected . . . to be in the range of $1.10 to $1.30 per share" was "clearly" forward-looking).

The Complaint *never* acknowledges the indisputable fact that, contemporaneously with its projections, Monsanto "identified for the investing public risks that could . . . cause the projections to differ materially from actual results." *Yellen*, 437 F. Supp. 2d at 968. To the contrary, it alleges that "the statements were not accompanied by meaningful cautionary language identifying important facts that could cause actual results to differ materially from those in the statements." AC ¶ 247. But this conclusory allegation does not satisfy the Reform Act. *See In re Cutera Sec. Litig.*, 610 F.3d 1103, 1112 (9th Cir. 2010) (affirming dismissal of complaint under safe harbor where sole attack on cautionary language "lack[ed] specificity" and provided "only conclusory allegations"). In any event, as will now be shown, Monsanto's forecasts were indeed accompanied by "meaningful cautionary statements."

**1. Forecasts made in connection with announcement of first quarter fiscal year 2009 results**

On January 7, 2009, the first day of the "Class Period," Monsanto issued a press release announcing it was raising full-year ongoing EPS guidance from a range of $4.20 to $4.40 to a range of $4.40 to $4.50. AC ¶ 110. On a conference call, Crews stated Monsanto expected the "U.S. *Roundup* business to still be strong" and to see "solid growth in [the] U.S. seeds and traits business." AC ¶¶ 111, 114. The Company increased its gross-profit-target range for fiscal year 2009 for *Roundup*/glyphosate from $2.3–2.4 billion to $2.4–2.5 billion, but predicted the business would fall to a steady-state level of $1.9 billion by fiscal 2012. AC ¶ 111. The next day, Monsanto filed its 10-Q for first quarter fiscal 2009, which made similar statements, including, for example, that Monsanto "expect[ed] to see increased gross profit as [its] higher-margin seeds and traits business grows and [it] realize[s] the full-year impact of improved average net selling prices in [its] *Roundup* business." AC ¶¶ 116–18.

At a February 10, 2009 investor conference, Crews reaffirmed Monsanto "still expect[ed]" to "more than doubl[e] the gross profit between 2007 and 2012" and was "comfortable that [it was] still staying on that trajectory." AC ¶¶ 120–22. A week later, Defendant Carl Casale, then EVP of Strategy and Operations, appeared at a separate investor conference and said Monsanto was clearly "on track" to meet that projection and "expect[ed] that [its] *Roundup* franchise will be from approximately $2.4 billion, $2.5 billion of gross profit this year." AC ¶ 124. *See also* AC ¶ 125 (March 10 statement reaffirming 2012 projection).

All these statements were forward-looking, *see* p. 8, *supra*, and identified as such. Ex. 7 at 5; Ex. 8 at 2, 23; Ex. 9 at 2; Ex. 3 at 1, 36; Ex. 11 at 1, 11; Ex. 12 at 2; Ex. 13 at 1, 12; Ex. 14 at 2; Ex. 15 at 2; Ex. 16 at 2. And they were all "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement[s]." 15 U.S.C. § 78u-5(c)(1)(A)(i). For example, as Monsanto explained in its January 7, 2009 earnings release:

> Certain statements contained in this release are "forward-looking statements," such as statements concerning the company's anticipated financial results, . . . future product performance, . . . business and financial plans and other non-historical facts. . . . *[S]ince these statements are based on factors that involve risks and uncertainties, the company's actual performance and results may differ materially from those described or implied by such forward-looking statements.*
>
> Factors that could cause or contribute to such differences include, among others: *continued competition in seeds, traits and agricultural chemicals*; the company's

> exposure to various contingencies, including . . . *public acceptance of biotechnology products*; the success of the company's research and development activities; . . . *the accuracy of the company's estimates related to distribution inventory levels*; . . . the effect of weather conditions . . . on the agriculture business or the company's facilities; *and other risks and factors detailed in the company's most recent Form 10-K Report* . . . . (Ex. 7 at 5) (emphasis added).

The projections made in the January 7, 2009 earnings call, the January 8, 2009 10-Q, and February and March conferences were accompanied by nearly identical cautionary language. And each time the speaker incorporated by reference the "Risk Factors" section of the Company's 10-K (filed October 24, 2008), which warned shareholders of "some of the important reasons that actual results may be materially different from those that we anticipate":[6]

- "*Competition in seeds and traits and agricultural chemicals has significantly affected, and will continue to affect, our sales. . . . Our competitors' success could render our existing products less competitive, resulting in reduced sales compared to our expectations or past results.* We expect to see increasing competition from agricultural biotechnology firms and from major agrichemical, seed and food companies. *We also expect to face continued competition for our Roundup herbicides . . . . The extent to which we can realize cash and gross profit from these products will depend on our ability to*: . . . *predict and respond effectively to competitor pricing and marketing*; provide marketing programs meeting the needs of our customers and of the farmers who are our end users; maintain an efficient distribution system; and develop new products with features attractive to our end users."

- "*The successful development and commercialization of our pipeline products will be necessary for our growth.* The processes of breeding, biotechnology trait discovery and development and trait integration are lengthy, and a very small percentage of the genes and germplasm we test is selected for commercialization. . . ."

- "*Our ability to match our production to the level of product demanded by farmers or our licensed customers has a significant effect on our sales, costs, and growth potential.* Farmers' decisions are affected by market, economic and weather conditions that are not known in advance. . . . However, product inventory levels at our distributors may reduce sales in future periods, as those

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[6] *See* Ex. 7 at 5; Ex. 8 at 2, 23; Ex. 9 at 2; Ex. 3 at 1, 36; Ex. 11 at 1, 11; Ex. 12 at 2; Ex. 13 at 1, 12; Ex. 14 at 2; Ex. 15 at 2; Ex. 16 at 2; Ex. 2 at 2.

> distributor inventories are worked down. In addition, inadequate distributor liquidity could affect distributors' ability to pay for our products and, therefore, affect our sales . . . ." (Ex. 2 at 2, 9–13) (emphasis added).

These "meaningful cautionary statements" put investors "'on notice of the danger of the investment'" by "'convey[ing] substantive information about factors that could cause results to differ materially from those projected.'" *Yellen*, 437 F. Supp. 2d at 959, 964. And while cautionary statements to be "meaningful" need *not* explicitly refer to the precise risk that is claimed ultimately to have caused actual results to differ from projections, *see Harris*, 182 F.3d at 807, the statements here identified just those risks—namely, competition on glyphosate (and seeds and traits), Monsanto's inability either to "predict and respond effectively to competition pricing and marketing" or to "match [its] production to the level of product demanded by farmers," and the effect of "product inventory levels . . . reduc[ing] sales in future periods." The safe harbor requires dismissal of claims based on these forecasts. *See Avaya*, 564 F.3d at 257 (dismissing fraud claim directed at projection where company's SEC filings explicitly warned that "price and product competition" might result in forecast "turn[ing] out to be wrong").

### 2. Forecasts made in connection with announcement of second quarter fiscal year 2009 results

On April 2, 2009, Monsanto issued a press release announcing its second-quarter-2009 results and reaffirming full-year ongoing EPS guidance in the range of $4.40 to $4.50. AC ¶ 127. Monsanto also announced *Roundup* sales decreased 21% compared with the prior year's second quarter, but that it expected orders to shift back to previous selling patterns in the "third and fourth quarters." Ex. 17 at 2. On a conference call, Monsanto repeated these statements and its forecast that it would double 2007 gross profits by 2012. AC ¶ 128. Noting that the *Roundup* business had earned $1.2 billion halfway through fiscal 2009, Crews predicted *Roundup* gross profit for the year would reach approximately $2.4 billion. AC ¶ 128. Ex. 18 at 4. On the same call, CEO Hugh Grant reiterated the prediction that *Roundup* gross profit would peak in 2009 and decline to approximately $1.9 billion by fiscal 2012. AC ¶ 128; Ex. 18 at 6. Monsanto also reported strong sales in its Seeds and Genomics business, and predicted 2012 gross profits for that business would exceed $7 billion. AC ¶ 129.

In its 10-Q the next day, Monsanto stated it "believe[d]" it was "positioned to sustain earnings growth and strong cash flow," and "expect[ed] to see increased gross profit as [its] higher-margin seeds and traits business grows and [it] realize[d] the full-year impact of improved average net selling prices in our *Roundup* business." AC ¶ 131. The 10-Q also set forth Monsanto's projection that *Roundup* would "peak in 2009 and continue to generate a significant source of cash and gross profit thereafter." AC ¶ 132.

At a May 13, 2009 conference, Monsanto reiterated it was "on track" to meet its plan to double gross profits from 2007 to 2012. AC ¶ 135. On May 27, 2009, Monsanto issued a press release announcing that it expected ongoing EPS for 2009 of $4.40—the low end of its previous guidance range. AC ¶ 137. The Company also announced its *Roundup* business would likely generate about $2 billion gross profit in fiscal 2009, down from its previous forecast of $2.4 billion. *Id.* At an investor conference that day, Grant acknowledged the reduced *Roundup* forecast, but stated that Monsanto still saw an opportunity to grow profits by 20% annually in light of anticipated Seeds and Genomics performance. AC ¶ 138.

These statements were all forward-looking, *see* p. 8, *supra*, and identified as such. And again, *each* was expressly accompanied by meaningful cautionary language that identified the risks that the revised forecasts might not be achieved, including the extensive list of risk factors contained in Monsanto's securities filings discussed above.[7] *See* Ex. 17 at 6–7; Ex. 18 at 1–2, 17; Ex. 19 at 2; Ex. 4 at 1, 44; Ex. 20 at 1, 10; Ex. 21 at 2; Ex. 22 at 3; Ex. 23 at 1, 13; Ex. 24 at 2. Moreover, on the April 2 call, Crews warned that the glyphosate business was "likely to become more competitive" as the Chinese "bring more volume on-line" and predicted Monsanto's sales volume would decline by some 30 million gallons in 2009 as it sought to maintain higher branded prices despite increased generic competition.[8] And in the May 27, 2009 press release, Monsanto disclosed that: "generic and other branded competitors continue to aggressively move larger-than-expected volumes of lower-priced material into the market place;" "application of [*Roundup*] is half that compared with product use at the end of May 2008;" and "[s]upply of glyphosate is now exceeding demand globally." Ex. 22 at 2. At the May 27 conference, Grant noted "the introduction of a large volume of Chinese generic material this year, about twice as much Chinese generic material as we have ever seen in the U.S. market [and which] arrived in a significant" pop. Ex. 23 at 3. Grant warned that Monsanto had no way to control Chinese generic volume, and that *Roundup* pricing was "going to [go] lower" in fiscal 2009. *Id.* at 6, 8. These pointed disclosures alerted investors to the precise risk that ultimately resulted in Monsanto's failure to meet its forecasts.

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7 The April 2 presentation incorporated by reference the warnings in the Company's most recent 10-Q, Ex. 19 at 2, which, in turn, incorporated by reference the above-quoted "Risk Factors" section of the 2008 10-K. Ex. 3 at 1, 36; pp. 12–13, *supra*.

8 On the same call, Grant cautioned that he did not know if *Roundup*'s gross profit would reach the $1.9 billion steady-state level in fiscal 2010 or 2012 or "if the path between them will be steep or rolling. They are all possible." AC ¶ 128; Ex. 18 at 6.

**3. Forecasts made in connection with announcement of third quarter fiscal year 2009 results**

On June 24, 2009, Monsanto issued a press release announcing third-quarter results and reiterating its forecast that gross profit would double from 2007 to 2012. AC ¶ 140. On an earnings call, Grant repeated Monsanto's fiscal-2009 projection for *Roundup*'s gross profit of $2 billion, but added that "we now believe it will deliver something in the neighborhood of $1 billion longer-term"—a 47% decrease from the previous steady-state prediction of $1.9 billion. AC ¶ 144. Grant also predicted the "Seeds and Traits segment is forecast to deliver $7.3 billion to $7.5 billion in gross profit" by 2012. AC ¶ 149. In its third quarter 10-Q, filed June 26, Monsanto stated the "seeds and traits business is expected to expand" and "will have significant near-term growth opportunities through a combination of improved breeding and continued growth of stacked and second generation biotech traits." AC ¶ 154. At an August 2009 investor event, the Company again stated that it was "on track to more than double 2007 gross profit in 2012." AC ¶ 156.

These statements were obviously forward-looking, *see* p. 8, *supra*, and were clearly identified as such. *All* these statements were accompanied by meaningful cautionary language, including references to Monsanto's risk disclosures in SEC filings. Ex. 25 at 6–7; Ex. 26 at 2, 20; Ex. 27 at 2; Ex. 5 at 1–2; Ex. 28 at 1; Ex. 2 at 9–11; AC ¶¶ 141, 143, 148, 151, 153, 155, 157. In addition, the June 24 press release disclosed "increased pressure from generic glyphosate and other branded competitors who continue to aggressively move larger-than-expected volumes of lower-priced material into the marketplace." Ex. 25 at 6. And on the June 24 call, Monsanto warned that the "competitive dynamics for glyphosate dramatically shifted" in the third quarter and glyphosate sales volume was "down 28 million gallons, as [it] held price for branded *Roundup* above the $20 per gallon level." Ex. 26 at 2. Casale cautioned that the "rate of decline in the pricing from the competition [is] more rapid than expected," the "sheer volume of competitive products sitting in the distribution channel . . . is unprecedented," and, going forward, the "changing supply environment" "may entail stretched premiums and lower volumes, or at the other end of the spectrum, sub-historic premiums and a recapture of share and volume." Ex. 26 at 6. The June and August 2009 forecasts are thus protected by the safe harbor.

**4. Forecasts made in September 2009**

On September 10, 2009, Monsanto issued a press release reaffirming that ongoing EPS for the recently concluded fiscal 2009 would be at the low end of its previously announced $4.40–$4.50 range. AC ¶ 158. Monsanto anticipated that the lower-than-expected 2009 gross profit for *Roundup*/glyphosate would be offset by higher-than-expected Seeds and Genomics gross profit. *Id.* Monsanto predicted that in fiscal 2010 (which had begun just nine days before), ongoing EPS would reach $3.10 to $3.30, but *Roundup*/glyphosate would provide only $650 to $750 million of gross profit. It projected net branded average selling price for *Roundup* of $10–$12 per gallon, down from over $20 in fiscal 2009. Monsanto stated it still saw a path to the $1 billion *Roundup*/glyphosate gross profit target in 2012. AC ¶ 162. At a pair of investor conferences in mid-September, Casale and Grant reiterated that Monsanto expected to more than double 2007 gross profit in 2012, led by expected gross profit of $7.3–$7.5 billion from the seeds franchise by 2012. AC ¶¶ 162–64, 166, 168–69, 171–72.

These statements were clearly forward-looking, *see* p. 8, *supra*, and identified as such. Once again, they were accompanied by meaningful cautionary statements, including references to the extensive risk disclosures in Monsanto's past securities filings. Ex. 29 at 2; Ex. 30 at 1, 12; Ex. 31 at 2; Ex. 32 at 1–2, 8; Ex. 33 at 2. And Monsanto addressed *Roundup*'s ongoing difficulties. At a September 10 conference, Casale warned that due to a "tremendous amount of Chinese production," there was "probably about four times as much in the inventory of generic glyphosate" in the U.S. market compared to a year ago and glyphosate prices had "dropped dramatically." AC ¶ 162. He added that, in response to these market conditions, Monsanto had "announced new pricing in the United States yesterday," and intended to slash prices in the rest of the world "to be competitive with the generic offering longer term," offering price incentives of $100 to $150 million in fiscal 2010. Casale also stated that, while Monsanto expected *Roundup*/glyphosate gross profit to reach $1 billion by 2012, this would be driven by cost reductions, not price increases. Ex. 30 at 4. Similarly, at a September 15 conference, Grant cautioned that *Roundup* still faced "large headwinds," including "enormous levels of competitive inventory . . . mainly Chinese generics, that has to be worked through." Ex. 32 at 3; *see also* Ex. 29 at 1 ("multiple headwinds causing us to forecast below [the $1 billion gross profit target] in the next two years"). The safe harbor applies.

**5. Forecasts made in connection with announcement of fourth quarter fiscal year 2009 and year-end results**

On October 7, 2009, Monsanto reported ongoing EPS for fiscal 2009 of $4.41—within the $4.40–$4.50 range predicted at the outset of the Class Period—and reaffirmed fiscal 2012 ongoing EPS guidance of $3.10 to $3.30. AC ¶ 174; Ex. 10 at 1–4. Monsanto also announced it "expected [Seeds and Genomics] to cross the $5 billion gross profit mark for the first time in 2010." AC ¶ 175. On a conference call, Monsanto said it still expected to more than double overall gross profit by 2012 and continued to have a "clear path to optimizing *Roundup* gross profit at the $1 billion target" by then. AC ¶ 177. Casale, who had recently replaced Crews as CFO, noted the planned 2010 launches of *RR2Y* and *SmartStax* "at levels unprecedented in our history and thus in the industry," and Grant stated that if the two new products "provide the compelling returns that we believe [they] promise," Monsanto could "see a path to servicing some 65% to 75% of the market opportunity . . . in 2012." AC ¶¶ 179–80. On

October 27, Monsanto filed its 10-K, which predicted "doubl[ing] [of] 2007 gross profit by 2012." AC ¶ 181. The 10-K also predicted *Roundup* "will decline in 2010 in light of our announced U.S. price reduction and global oversupply of low priced generic material." AC ¶ 182. A November 10 press release repeated these predictions. AC ¶ 185.

These statements were clearly forward-looking, identified as such, and accompanied by meaningful cautionary statements, including the risk factors identified in the prior SEC filings. *See* p. 8, *supra*; Ex. 10 at 7; Ex. 34 at 2, 10–13; Ex. 35 at 2, 19; Ex. 36 at 2; Ex. 2 at 2. On the October 7 call, Casale warned that the two new product launches would "come with a cost" and would not "immediately translate into share shifts." Ex. 35 at 5. The Company likewise cautioned that, despite the two launches, the Seeds-and-Genomics growth rate would drop in 2010 (from its historic 20% rate) to 13–15%. Ex. 35 at 4–5; Ex. 36 at 12. And the 10-K included a two-and-a-half page discussion of Risk Factors, identified as "important reasons that actual results may be materially different from those that we anticipate." Ex. 34 at 2, 10–13. These included: the "*continued competition for our Roundup herbicides*;" Monsanto's ability to "*predict and respond effectively to competitor pricing and marketing*;" the "successful development and commercialization of our pipeline products;" Monsanto's "*ability to match our production to the level of product demanded by farmers or our licensed customers has a significant effect on our sales, costs, and growth potential*;" the fact that "product inventory levels at our distributors may reduce sales in future periods, as those distributor inventories are worked down"; and the fact that "*[i]nternational glyphosate manufacturing capacity has increased in the past few years [which] will impact the selling price and margin of Roundup*." Ex. 34 at 10–13 (emphasis added). This specific cautionary language was clearly sufficient to alert investors of the risks Monsanto's forecasts might not be met.

At a November 10, 2009 investor event, Monsanto again stated it remained "on track" to double gross profits from 2007 to 2012. AC ¶ 185. Grant stated that the key to meeting this forecast was Seeds and Genomics. On November 10 and December 2, defendant Brett Begemann, EVP Seeds and Traits, echoed the expectation that "the corn and soy blockbuster launches [would] drive [the] gross profit bridge to 2012" and expressed confidence that Monsanto could "supply 8 million to 10 million acres of [*RR2Y*] this [fiscal] year." AC ¶¶ 186, 188, 193. Casale reaffirmed Monsanto expected *Roundup*/glyphosate to "generate on the order of $650 million to $750 million of gross profit" in fiscal 2010, with a goal of "stabilizing" the business at approximately $1 billion gross profit in fiscal 2012. AC ¶ 190; Ex. 38 at 20. At a December 8 investor conference, and in a press release that same day, Grant and the Company reiterated the prediction that it was on track to double gross profit by 2012. AC ¶¶ 195, 199.

These statements were clearly forward-looking, identified as such, and accompanied by meaningful cautionary statements, including references to the extensive risk disclosures in prior SEC filings. *See* p. 8, *supra*; Ex. 37 at 3; Ex. 38 at 2, 41; Ex. 42 at 1, 9; Ex. 43 at 2; Ex. 44 at 1, 13; Ex. 45 at 2. Moreover, at the November 10 event, Monsanto cautioned it had been the "wettest fall in 120 years," which had delayed harvest and farmers' seed purchases for the next growing season. Ex. 38 at 6, 21, 30. Grant noted that 2010 was the "introductory year" for *RR2Y* and *SmartStax* and that, relative to the overall business, the new traits were "still quite small." Ex. 38 at 29. Begemann concurred that the "total volumes of *SmartStax* and [*RR2Y*] are not huge." Ex. 38 at 30. Referring to reports that *RR2Y* had not delivered yield improvements that Monsanto predicted, Begemann acknowledged that, as with any new biotech product, there are "some farmers out there that don't enjoy the experience that we would like for them to experience in the first year of launch." Ex. 38 at 12. This meaningful cautionary language explicitly warned investors that, while *RR2Y* and *SmartStax* were expected to add to the bottom line of the Seeds and Genomics business by fiscal 2012, these new products were only a small portion of the business in 2010, and performance and market receptivity remained issues. Dismissal of the November–December 2009 claims is thus required.

**6. Forecasts made in connection with announcement of first quarter fiscal year 2010 results**

On January 6, 2010, Monsanto announced first-quarter-fiscal-2010 results and confirmed 2010 ongoing EPS guidance of $3.10–$3.30. AC ¶ 201. It noted fiscal 2010 "marks the launch of . . . *SmartStax* corn," and based on early orders, it was "on pace to meet the more than 4 million-acre target." Ex. 46 at 4. *RR2Y* was also stated to be on pace to meet the launch target of 8–10 million acres. AC ¶ 204. On an earnings call, Casale discussed the "progress" Monsanto was making in its "plan to generate $650 million to $750 million" *Roundup*/glyphosate gross profit in 2010—"on the way to a sustainable $1 billion in gross profit by 2012." AC ¶ 202; Ex. 47 at 3.

Two days later, Monsanto filed its 10-Q for the first quarter, which repeated the prediction that it would double gross profit between 2007 and 2012, even though it foresaw declining 2010 *Roundup* gross profit. AC ¶¶ 208, 212. It also projected Seeds and Genomics would have "significant near-term growth opportunities through a combination of improved breeding and continued growth of stacked and second generation biotech traits" and was "expected to expand." AC ¶ 210.

At a January 13, 2010 conference, Casale again expressed confidence in Monsanto's previously articulated guidance. AC ¶ 214. On February 10, Begemann repeated that Monsanto was "on path" to double 2007 gross profit by 2012. AC ¶ 215. And on February 25, Casale stated that "even at the low end" of the anticipated acreage ranges for the commercial launches of *RR2Y* and *SmartStax* in 2010, Monsanto would have "adequate trajectory . . . to achieve [its] 2012 milestones." AC ¶ 216.

Once again, these predictions were forward-looking, clearly identified as such, and accompanied by the same risk-factor disclosures previously made to the market. *See* p. 8, *supra*; Ex. 46 at 6; Ex. 47 at 2, 22; Ex. 48 at 2; Ex. 49 at 1, 47; Ex. 50 at 1, 21; Ex. 51 at 2; Ex. 52 at 1, 11; Ex. 53 at 2; Ex. 54 at 1, 14; Ex. 55 at 2. And Monsanto could not have been clearer that *Roundup* remained under competitive pressure. On the January 6 call, Casale noted that "clearing of generic inventory is still under way, keeping farm gate generic prices depressed" in the U.S. Ex. 47 at 3. Monsanto's first quarter 10-Q likewise disclosed that: the "significant supply of lower priced generics has caused increased competitive pressure in the market and an anticipated decline in the business;" *Roundup* "prices have declined in fiscal year 2010 and are expected to remain lower than in 2008 and 2009;" and in the short-term, Monsanto expected "volatility in [its] *Roundup* business." Ex. 49 at 30, 40. Casale warned on February 25 that the Company's 2010 guidance "includes some headwinds," including launch costs associated with *RR2Y* and *SmartStax* and some $100 million to $150 million in trade incentives expected to be offered on *Roundup*. Ex. 54 at 2. Furthermore, Casale stated that the acreage targets previously announced for *RR2Y* and *SmartStax* represented the "top end of the range" and would likely be 20% lower, noting, yet again, that the significance of the two launches "was more about getting the product[s] positioned to have [a] better trajectory to grow [in 2012] than it was [about] the incremental gross profit contribution in 2010." Ex. 54 at 7, 9. The January and February 2010 forecasts are thus covered by the safe harbor.

**7. Forecasts made in connection with announcement of second quarter fiscal year 2010 results**

On April 7, 2010, Monsanto announced second-quarter results, including a $1 million loss in *Roundup*/glyphosate, and confirmed that it expected 2010 ongoing EPS to be at the low end of the previously announced $3.10–$3.30 range. AC ¶ 218. Monsanto reduced its *Roundup*/glyphosate gross profit forecast to "plus-or-minus $600 million for the year" and stated that it no longer expected to double 2007 gross profit by 2012 AC ¶ 218. On an earnings call that morning, Grant said the Company "still believe[d] that [*Roundup*] can be a sustainable cash generating business." AC ¶ 219. In its 10-Q filed the next day, Monsanto reiterated that it expected *Roundup* gross profit to decline in 2010. AC ¶ 220.

These statements were forward-looking, *see* p. 8, *supra*, and identified as such. And even as Monsanto lowered its 2010 *Roundup* forecast, it cautioned investors of factors that might result in even that lowered forecast not being met. *See* Ex. 56 at 6–7; Ex. 57 at 1, 27; Ex. 58 at 2; Ex. 59 at 1. In addition to repeating all of its prior warnings, the April 7 press release noted the "continued presence of generic inventory" and Monsanto's need to adopt "competitive pricing strategies." Ex. 56 at 6. On the April 7 call, Casale stated that U.S. *Roundup* prices remained "slightly below" the previously projected $10–$12-per-gallon range "as competitive generic inventory has moved out of the system slower than we would have anticipated, depressing farm gate prices below what we [would] expect." Ex. 57 at 5. Casale advised that Monsanto was "starting to see early evidence of competitors using [generic glyphosate] as a los[s] leader to sell other chemical products in the[ir] portfolios creating margin compression in the channel that threatens to keep farm gate prices from fully rebounding with seasonal refills." Ex. 57 at 5. He and Grant warned that the "competitive dynamics" within generic glyphosate "remain acute resulting in systemic price competition," which had "the potential to strain our full year Roundup performance and put pressure on our ability to meet our projected gross profit expectations," and that, if it persisted, Monsanto "might be looking at a lower level of [*Roundup* gross profit] sustain[ably] for the long term for the business." Ex. 57 at 4, 9, 15.[9]

* * *

In sum, throughout the Class Period, Monsanto's forward-looking statements were accompanied by meaningful cautionary statements that "conveyed substantive information about concerns specific to" its business and warned investors that actual results could differ from projections. *Yellen*, 437 F. Supp. 2d at 968. The safe harbor requires dismissal.

**B. Monsanto's statements are protected by the "bespeaks caution" doctrine.**

The judicially created "bespeaks caution" doctrine independently requires dismissal of Plaintiff's various forecast-based claims. As the Court of Appeals has explained:

> [When] forecasts, opinions or projections are accompanied by meaningful cautionary statements, the forward-looking statements will not form the basis for a securities fraud claim if those statements did not affect the "total mix" of information the document provided investors. In other words, cautionary language, if sufficient, renders the alleged omissions or misrepresentations immaterial as a matter of law.

*Parnes*, 122 F.3d at 548. Thus, a forward-looking statement accompanied by meaningful cautionary statements that "'relate directly to that by which plaintiffs claim to have been misled'" is not actionable. *Id.*[10]

[9] Unfortunately, the "systemic price competition" did continue and, on May 27, 2010—the last day of the Class Period—Monsanto announced that it was "repositioning its *Roundup* business in the face of [these] fundamental structural changes." In the near term, the Company would lower prices and accelerate payment on trade incentives. In the long term, it would price *Roundup* nearer to the level of generics and move to a single-brand strategy. As a result, Monsanto stated that *Roundup* was expected to earn $50 million to $200 million in fiscal 2010, and thereafter in the range of $250 million to $300 million annually. Ex. 60 at 1–2; Ex. 61 at 5–6; AC ¶ 222.

[10] Because the doctrine is based upon the "total mix" of information in the market at the time of the allegedly fraudulent statement, a risk disclosure need not be in the same document as the alleged misstatement or omission. Thus, courts have repeatedly dismissed securities-fraud claims under the "bespeaks caution" doctrine where either the document or speech at issue or a prior or contemporaneous SEC filing contains meaningful cautionary language

(footnote continued)

As shown above, Monsanto's projections were accompanied by "meaningful cautionary statements"—both when the statements were made and in Monsanto's prior and contemporaneous SEC filings—alerting investors that the difficulties of predicting and responding to competitor pricing, matching production to farmer demand, managing product inventory levels and launching new products could result in its missing forecasts. Monsanto's cautionary statements "relate[d] directly to [the forecasts] by which [plaintiff] claim[s] to have been misled." *Parnes*, 122 F.3d at 548. The "bespeaks caution" doctrine thus requires dismissal.

## POINT II

## PLAINTIFF FAILS TO ALLEGE PARTICULARIZED FACTS SHOWING THAT DEFENDANTS' STATEMENTS WERE FALSE OR MISLEADING.

Under the Reform Act, a private securities-fraud complaint must "'specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading.'" *Tellabs*, 551 U.S. at 321 (quoting 15 U.S.C. § 78u-4(b)(1)). To satisfy this requirement, the complaint "may not rest on mere allegations that fraud has occurred." *In re Cerner Corp. Sec. Litig.*, 425 F.3d 1079, 1083 (8th Cir. 2005). Instead, the complaint must plead specific facts demonstrating why the alleged misstatements were false or misleading when made. *Id.* "The purpose of this heightened pleading requirement was generally to eliminate abusive securities litigation and particularly to put an end to the practice of pleading 'fraud by

(footnote continued)

that relates directly to the alleged misstatement or omission. *See, e.g.*, *In re Amdocs Ltd. Sec. Litig.*, 390 F.3d 542, 547–48 (8th Cir. 2004) (warnings in SEC filing put investors "on notice that demand had softened," rendering allegedly misleading statements made in subsequent press releases and conference call regarding customer demand "immaterial as a matter of law"); *Yellen*, 437 F. Supp. 2d at 968 (dismissing claim based on allegedly false earnings projection when company's 10-K had previously disclosed that the cost of raw materials may cause actual results to differ from forecast).

hindsight.'" *In re Navarre Corp. Sec. Litig.*, 299 F.3d 735, 742 (8th Cir. 2002). A long complaint is no substitute for a specific one: as another court in this Circuit put it, the "temptation" to think that a complaint "spanning more than 100 pages and . . . more than 200 paragraphs could not fail to be specific" is "dangerous and must be resisted." *In re 2007 Novastar Fin., Inc. Sec. Litig.*, 2008 WL 2354367, at *2 (W.D. Mo. 2008), *aff'd*, 579 F.3d 878 (8th Cir. 2009). As the Complaint here illustrates, the opposite is often true.

This heightened pleading requirement applies with particular force where, as here, a complaint challenges projections as "false or misleading." Projections are, perforce, uncertain. Projections for agricultural products subject to the whims of Mother Nature are especially uncertain. "[T]hat a prediction proves to be wrong in hindsight does not render the statement untrue when made." *In re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 934 (9th Cir. 1996). Whenever a company makes a projection, there are any number of elements factored into that projection—both favorable and unfavorable. Unless the particularity requirement is strictly applied to missed projections, a plaintiff could *always* point (in hindsight) to some unfavorable factor in isolation, claim it was not disclosed when the projection was announced, and assert the projection was therefore "false." For this reason, where a plaintiff claims that projections were "false" because of some unfavorable factor that was allegedly not disclosed, the complaint "cannot survive the [Reform Act's] falsity standard" *unless* the supposedly undisclosed factors "*necessarily* rendered [the company] unable to achieve its project[ion]." *Cerner*, 425 F.3d at 1084 (emphasis added).

*Cerner* is instructive. Plaintiff claimed a company's earnings projections and its statement that demand for its products remained "strong" were materially false and misleading because it failed to disclose it "was losing deals due to increased competition, dissatisfied customers, a general economic downturn, an inexperienced sales force, and a neglect of smaller deals." *Id.* at 1083–84. The Court of Appeals affirmed dismissal of the complaint. *Id.* at 1084. The Court reasoned that a company "could conceivably lose a material number of deals it had pursued, and yet continue to see a strong demand for its products," and there was "no indication on the face of the complaint that even a material loss of deals necessarily rendered [it] unable to achieve its projected earnings." *Id.* Absent any allegation that "an undefined loss of sales necessarily would affect the company's . . . ability to meet its future earnings projections," the complaint "cannot survive the Reform Act's falsity standard." *Id.*

The courts of this Circuit have consistently followed *Cerner* in dismissing fraud claims based on misleading projections where the plaintiff has failed to allege undisclosed facts demonstrating the projections were "necessarily unattainable" when made. *See, e.g.*, *In re Hutchinson Tech., Inc. Sec. Litig.*, 536 F.3d 952, 958–59, 961 (8th Cir. 2008); *In re Daktronics, Inc. Sec. Litig.*, 2010 WL 2332730, at *13 (D.S.D. 2010) (allegation that company faced undisclosed regulatory challenges did not equate to conclusion that it had no basis for projections); *In re Patterson Cos., Inc. Sec. Litig.*, 479 F. Supp. 2d 1014, 1031 (D. Minn. 2007) (dismissing claim absent allegation that downturn at division "necessitated a modification of the company's projected growth"); *Yellen*, 437 F. Supp. 2d at 956–57 (dismissing claim of false forecast absent specific allegations from which court could conclude that "poor performance in first two months made the achievement of . . . forecasts 'necessarily unattainable'").

Here, as in *Cerner* and its progeny, Plaintiff has failed to plead specific facts demonstrating that any of the allegedly undisclosed factors "necessarily rendered [Monsanto] unable to achieve" any of the challenged forecasts. Plaintiff has likewise failed to plead specific facts demonstrating that any of the few challenged statements of then-current facts was false when made. The Complaint must therefore be dismissed. *See* 15 U.S.C. § 78u-4(b)(1).

## A. Plaintiff has failed to plead specific facts demonstrating that Monsanto's forecasts were false or misleading.

### 1. Forecasts made in connection with announcement of first quarter fiscal year 2009 results

As noted, on January 7, 2009, Monsanto raised its ongoing EPS guidance for the year to a range of $4.40 to $4.50 and its gross profit target for *Roundup*/glyphosate to a range of $2.4 to $2.5 billion, and Crews stated Monsanto expected to see "solid growth" in its U.S. seeds and traits business. AC ¶¶ 110, 111, 114. On February 10, Crews predicted *Roundup* would reach its "peak" in gross profit in 2009. AC ¶ 122. On February 18, Casale stated Monsanto remained "on track" to double 2007 gross profit by 2012, a prediction reaffirmed by Monsanto on March 10. AC ¶¶ 124–25.

The Complaint asserts that these predictions were "false and misleading" because Defendants failed to disclose that:

(a) By January 7, 2009, "demand for Monsanto's *Roundup* and other glyphosate-based products had materially declined and inventory of Monsanto's glyphosate was materially increasing due to Monsanto's high prices;"

(b) By January 7, 2009 "competitive prices of glyphosate, a metric Defendants used to establish Monsanto's gross profitability targets, had dramatically declined;" and

(c) "Monsanto's competitors . . . Dow and Syngenta, in order to gain market share in the seeds and traits market, were selling glyphosate at a material discount compared to Monsanto's glyphosate and, as a result, sales of Monsanto's seeds and traits were being materially, negatively affected." (*See* AC ¶¶ 119, 123, 126.)

These falsity allegations are plainly inadequate. *First*, Monsanto's increase in guidance to a range of $4.40 to $4.50 per share was not even an *inaccurate prediction*—the fiscal year 2009 ongoing EPS ultimately achieved by Monsanto was *$4.41* per share (Ex. 10 at 1–2)—*within* the predicted range. Dismissal is required. *See In re Best Buy Co. Sec. Litig.*, 2005 WL 839099, at *1, *10 (D. Minn. 2005) (dismissing complaint where projection met).

*Second*, that Monsanto raised the *Roundup component* of its overall 2009 profit projection from "a range of $2.3–2.4 billion to a range of $2.4–2.5 billion" was an inaccurate prediction: the final result was $1.836 billion. Ex. 10 at 5. But nowhere does the Complaint allege that any of the allegedly undisclosed factors claimed to have made this projection "false" "necessarily rendered [Monsanto] unable to achieve its project[ion]." *Cerner*, 425 F.3d at 1084. Plaintiff claims that glyphosate demand had declined and Monsanto's inventory had increased by early January 2009, four months into the fiscal year, but, of course, such variables are constantly fluctuating and in no way could have "necessarily rendered" Monsanto unable to achieve its full-year projection. *Id.* Nor could the alleged decline in the generic price of glyphosate prior to January 2009—as the Complaint recognizes, glyphosate prices were "volatil[e]" in this period. AC ¶ 46. And, as the Complaint concedes, the generic price of glyphosate was but "*a* metric" in projecting *Roundup* results. *See* AC ¶¶ 112, 119 (emphasis added). Numerous *other* metrics obviously factored into the projection as well, including whether *Roundup* would command a premium in the marketplace over the price of generic glyphosate, and for how long.

*Third*, Plaintiff's allegation that Dow and Syngenta were selling glyphosate at a material discount did not render Monsanto's forecast "necessarily unattainable." *Cerner*, 425 F.3d at 1086. The Complaint does not allege any specific facts as to the size of these sales relative to the overall glyphosate market or to Monsanto's sales of *Roundup* or non-branded glyphosate. Here, as in *Yellen*, "Plaintiff has offered no . . . comparisons with competitor operations" that would allow this Court to conclude Monsanto's projections were not attainable. 437 F. Supp. 2d at 957. And, of course, competitor strategies vary over time; whatever discounts

Monsanto's competitors were offering four months into fiscal 2009 thus did not necessarily render Monsanto's full-year projections unattainable.[11]

Finally, with respect to Casale's February 2009 reiteration of Monsanto's 2007 projection that gross profit would double between 2007 and *2012*, fiscal 2012 was at that time still *three years away*. None of the allegedly undisclosed factors in early 2009 could possibly have rendered Monsanto's 2012 forecast "necessarily unattainable."

**2. Forecasts made in connection with announcement of second quarter fiscal year 2009 results**

On April 2, 2009, Monsanto affirmed its ongoing EPS guidance of $4.40 to $4.50, modified its *Roundup* gross profit guidance to $2.4 billon, maintained its steady-state gross-profit projection for *Roundup* for 2012, and reiterated Monsanto would double its fiscal 2007 gross profit by 2012. AC ¶¶ 127–28. Plaintiff alleges these forecasts were false on the same theory as the prior quarter's. *See* AC ¶ 130. These allegations fail for the same reasons: the Complaint alleges no facts demonstrating that, as of April 2, any of these forecasts were "necessarily unattainable." *Cerner*, 425 F.3d at 1086. Indeed, on the April 2 call, Crews explained why Monsanto believed its $2.4 billion *Roundup* gross-profit projection was attainable in fiscal 2009. Through the second quarter, Monsanto had already earned gross profit of $1.2 billion from *Roundup*—halfway to the annual target—and was continuing to sell *Roundup* at prices "well above $20 a gallon." Ex. 18 at 13. Crews further disclosed that, while Monsanto expected its sales volume to fall due to (among other things) Chinese competition, it believed this would be offset by higher prices, which Monsanto believed would be "maintained above the $20 range for

[11] The same can be said for the allegation that Dow and Syngenta were selling discounted glyphosate to gain seeds-and-traits market share. Plaintiff alleges no specific facts as to the size of any inroad that Dow or Syngenta was able to make by this strategy—a telling omission since Monsanto met its 2009 gross-profit forecast for Seeds and Genomics. Ex. 10 at 1; Ex. 22 at 1.

[its] branded sales for the full year." *Id.* at 4. Plaintiff has alleged no facts demonstrating these explanations were necessarily false.

Monsanto also stated on April 2 that "in 2012 . . . our seeds and genomics gross profit is expected to top $7 billion," and its 10-Q the next day stated that "our seeds and traits business is expected to expand" and the "seeds and traits business will have significant near-term growth opportunities." AC ¶¶ 129, 131, 133. Plaintiff claims "falsity" premised on what it calls the "failure" of Monsanto's *RR2Y* launch. *See* AC ¶ 134(d). But as Monsanto disclosed on the April 2 call (AC ¶¶ 125–31), the "launch" of *RR2Y* in fiscal 2009 was a "pre-commercial introduction" limited to just 1.5 million acres—just *2%* of the 77 million acres on which Monsanto projected its soybean traits would be planted in the U.S. that year. Ex. 18 at 4, 6. Plaintiff has alleged no facts showing that the results of this limited "pre-commercial introduction" in fiscal 2009 "necessarily rendered" Monsanto's seeds-and-traits forecast for 2009 unachievable—let alone 2012. *Cerner*, 425 F.3d at 1084. Indeed, Monsanto *met* the 2009 forecast—at the *top end* of the $4.4–4.5 billion range forecasted on April 2. Ex. 10 at 4.

On May 27, 2009, Monsanto issued a press release announcing that it expected ongoing EPS of approximately $4.40 in fiscal 2009. AC ¶ 137. As with Monsanto's January and April guidance for 2009, Plaintiff has failed to allege facts showing that this projection was inaccurate (let alone false): Monsanto's fiscal 2009 earnings per share was $4.41. Ex. 10 at 1–2.

Also on May 27, citing stronger-than-expected competition, Monsanto lowered its 2009 *Roundup*/glyphosate gross-profit forecast from $2.4 billion to $2 billion. AC ¶¶ 137–38. Plaintiff again alleges Defendants failed to disclose that both demand for *Roundup*/glyphosate and competitive prices for generic glyphosate had dramatically declined. AC ¶ 139. Plaintiff overlooks Monsanto's disclosures on May 27 that: "generic and other branded competitors continue to aggressively move larger-than-expected volumes of lower priced [glyphosate] into the marketplace;" *Roundup*'s recent decline was attributable to the "introduction of a large volume of Chinese generic material . . . about twice as much . . . as we have ever seen in the U.S. market and it arrived in a significant" pop; "application of the product is half that compared with product use at the end of May 2008;" "[s]upply of glyphosate is now exceeding demand globally;" and *Roundup* pricing in fiscal 2009 was "going to [go] lower." Ex. 22 at 2; Ex. 23 at 3, 8. Because Monsanto actually disclosed the market conditions that Plaintiff claims it did not, dismissal is required. Moreover, Plaintiff again fails to allege facts demonstrating the revised 2009 *Roundup* gross-profit projection was "necessarily unattainable." *Cerner*, 425 F.3d at 1086.

### 3. Forecasts made in connection with announcement of third quarter fiscal year 2009 results

On June 24, 2009, Monsanto issued a press release announcing third-quarter results and revised full-year guidance. It reported gross profit for *Roundup*/glyphosates of $273 million, down 54% from third-quarter 2008, on net sales of $614 million, down 47% from that quarter. AC ¶ 140; *see* Ex. 25 at 5. During an earnings call, Grant stated the *Roundup* business was still expected to reach $2 billion in gross profit in fiscal 2009, but "will deliver something in the neighborhood of $1 billion longer-term." AC ¶ 144. Plaintiff invokes the same trilogy of "falsity" theories for the two previous quarters: Monsanto allegedly failed to disclose *Roundup*/glyphosate "demand . . . had materially declined," inventory "was materially increasing," and competitors were materially discounting glyphosate. AC ¶¶ 141, 148.

But Plaintiff ignores Monsanto's contemporaneous disclosures alerting investors to the increasingly difficult competitive environment for *Roundup*. Thus, the June 24 press release cited "increased pressure from generic glyphosate and other branded competitors who continue to aggressively move larger-than-expected volumes of lower-priced material into the marketplace." Ex. 25 at 6. And during the June 24 call, Monsanto stated that: the "competitive dynamics for glyphosate dramatically shifted" in the third quarter; the "speed and depth of the [market] transition was unprecedented" and "far exceeded even our most conservative expectations;" "[n]ot only is the rate of decline in the pricing from the competition more rapid than expected, but the sheer volume of competitive products sitting in the distribution channel, particularly in the U.S., is unprecedented;" and, in view of the "changing supply environment," Monsanto may face a choice between "stretched premiums and lower volumes" or "sub-historic premiums and a recapture of share and volume." Ex. 26 at 2, 5–6. Monsanto thus amply disclosed the competitive pressures *Roundup* was facing. Plaintiff nevertheless contends that Monsanto's revised $2 billion gross profit forecast was false, but alleges no facts demonstrating Monsanto was "necessarily . . . unable to achieve" it. *Cerner*, 425 F.3d at 1084.

Plaintiff also challenges Grant's statement on the June 24 call that the Seeds and Genomics segment "is forecast to deliver $7.3 billion to $7.5 billon in gross profit" by fiscal 2012, as well as the statements in the third quarter 10-Q filed June 26 that this segment was "expected to expand" and "will have significant near-term growth opportunities through a combination of improved breeding and continued growth of stacked and second-generation biotech traits." AC ¶¶ 149, 154. Plaintiff asserts these forecasts were false and misleading because Monsanto's seeds and traits business "was experiencing material difficulties," to wit, the *RR2Y* launch was a "failure" in that Monsanto was unable to sell the new seeds at premium prices and competitors were discounting glyphosate to gain seeds-and-traits market share. AC ¶¶ 151, 155. These allegations are plainly inadequate because there are no specific facts pleaded demonstrating that these purported developments "necessarily rendered [Monsanto] unable to achieve its [2012] projec[tion]" for Seeds and Genomics or would even prevent that segment from expanding. *Cerner*, 425 F.3d at 1084.[12] Moreover, Plaintiff's allegation that Monsanto's seeds business "was experiencing material difficulties" is belied by Monsanto's third quarter 2009 results: gross profit for Seeds and Genomics for the quarter was 17% higher than the third quarter 2008 gross profit, on a 10% increase in sales, and soybean gross profit for the quarter was up 26% over the prior year's quarter on a 21% increase in sales. Ex. 5 at 33.

**4. Forecasts made in September 2009**

On September 10, 2009, Monsanto issued a press release and conducted an investor call. It reaffirmed full-year ongoing EPS guidance for 2009 at the low end of the previously announced range of $4.40 to $4.50. It also forecasted *Roundup*/glyphosate gross profit in fiscal 2010 in the range of $650 million to $750 million. AC ¶¶ 158, 162; Ex. 29 at 1. Grant reiterated that *Roundup*/glyphosate forecast at a conference on September 15, 2009. AC ¶¶ 171–72. Plaintiff claims these statements were false and misleading because Monsanto failed to disclose that its competitors were discounting glyphosate and that "materially decreasing the price of Monsanto's *Roundup*/glyphosate in September [2009] had not increased demand for Monsanto's *Roundup* and other glyphosate-based products." AC ¶¶ 159, 165.[13]

These allegations fail. As the Complaint notes, Monsanto disclosed at the September 10 conference it had "announced new pricing [of *Roundup*] in the United States *yesterday* [and] will throughout the rest of the world." AC ¶ 162 (emphasis added). As the price cut had just been announced, Monsanto could not possibly have known it "failed" to stimulate

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12 Plaintiff's challenge to Grant's prediction on September 15 that, by 2012, Monsanto "will have $7.3 billion to $7.5 billion of gross profit in our seeds franchise" fails for the same reasons. AC ¶ 169.

13 Certain paragraphs of the Complaint mistakenly refer to the date of this repricing as September *2010*, not 2009. *See, e.g.*, AC ¶¶ 184, 187. As the Complaint (¶ 162) elsewhere states, however, Monsanto announced the price reduction on September 9, *2009*.

demand. Moreover, Monsanto had already disclosed the effect of its competitors' discounting on *Roundup*. *See* pp. 31–33, *supra*. As the Complaint also notes, on the September 10 call Casale stated that, due to the "tremendous amount of Chinese production," the market had become "oversupplied," prices had "dropped dramatically," and there was "probably about four times as much in the inventory of generic glyphosate in the [U.S.] as there was a year ago at this point in time." AC ¶ 162. And at the September 15 conference, Grant said *Roundup* continued to face "large headwinds," including "enormous levels of competitive inventory . . . mainly Chinese generics."[14] Ex. 32 at 3. In any event, Plaintiff alleges no facts demonstrating the revised 2010 gross profit guidance for *Roundup* was "necessarily unattainable." *Cerner*, 425 F.3d at 1086.

**5. Forecasts made in connection with announcement of fourth quarter fiscal year 2009 and full-year results**

On its fourth-quarter earnings call on October 7, 2009, Monsanto stated it saw "a clear path to optimizing *Roundup* gross profit at the $1 billion target by 2012." AC ¶ 177. Plaintiff claims, once again, that this forecast was misleading because Monsanto failed to disclose that the September 2009 price cut had not increased *Roundup* demand. AC ¶ 178. Plaintiff ignores that, on the October 7 call, when asked how farmers had reacted to the price cut, Casale responded that it had been received well to date "but the [selling] season's just getting going" and "it's really early yet." Ex. 35 at 11. In any event, the Complaint does not plead any specific facts showing that—whatever the impact of the September 2009 *Roundup* price cut to that point—the 2012 gross profit guidance was "necessarily unattainable" as of October 7, 2009, nearly *three years* before fiscal 2012 would end. *Cerner*, 425 F.3d at 1086.

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14 Plaintiff also challenges the September 2009 predictions of Casale and Grant that Monsanto was "still on track" to double 2007 gross profit by 2012. *See* AC ¶¶ 164–65, 168, 170. As discussed (p. 44), this claim fails.

Plaintiff also challenges the statement in Monsanto's 10-K, filed October 27, 2009, predicting *Roundup* would "continue to generate a strong source of cash and gross profit," even though its gross profit peaked in 2008. Plaintiff again claims Monsanto failed to disclose the September 2009 price cut did not increase demand. AC ¶¶ 182, 184. But Plaintiff ignores the 10-K disclosures that *Roundup* remained under competitive pressure despite the price cut.[15] In any event, Plaintiff alleges no facts demonstrating that *Roundup* was "necessarily" unable to generate a steady source of cash and gross profit as of October 27. *Cerner*, 425 F.3d at 1084.

Plaintiff likewise challenges Casale's statement at the November 10 investor event repeating the *Roundup*/glyphosate 2010 forecast of $650–$750 million in gross profit. AC ¶ 190. But once again, while Plaintiff challenges the failure to disclose that the September 2009 price decrease had yet to increase demand, there is no allegation of facts showing that this "necessarily rendered [Monsanto] unable to achieve" its projection. *Cerner*, 425 F.3d at 1084.

Plaintiff also attacks a series of predictions in this period relating to Seeds and Genomics, including the October 7 press release statement that this segment was "expected to cross the $5 billion profit mark for the first time in 2010" (AC ¶ 175), the November 10 press release statement that the 2012 Seeds and Genomics gross-profit contribution was expected to be $7.3–$7.5 billion (AC ¶ 185), and the November 10 investor conference statement expressing confidence that the commercial launch of *RR2Y* in fiscal 2010 would cover 8–10 million acres. AC ¶ 188. Plaintiff alleges these projections were "false" because Monsanto failed to disclose:

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[15] The 10-K disclosed: Monsanto's "numerous major global competitors . . . increased production which, coupled with purchases from local generic companies, has increased channel inventory for generic glyphosate;" the "significant supply of lower priced generics has caused increased competitive pressure in the market and an anticipated decline in the business;" glyphosate prices "have declined in fiscal year 2010 and are expected to remain lower than in 2008 and 2009;" and "[w]e believe our *Roundup* herbicide gross profit . . . will decline in 2010 in light of our announced U.S. price reduction and global oversupply of low priced generic material." Ex. 34 at 5, 21, 36, 38. Monsanto made similar disclosures in its Proxy Statement filed on December 7, 2009. Ex. 62 at 20.

(1) sales of *RR2Y* soybean seeds for the 2010 growing season, which allegedly began in "late 2009," were "materially below expectations" because the new seeds were "too expensive," "did not materially improve crop yields," and were "sold in limited varieties;" and

(2) "reports that Monsanto's new [*RR2Y* seeds] did not yield 7–11% more bushels per acre" than Monsanto's previous generation soybean product "materially negatively impacted the sales of new [*RR2Y*] seeds." AC ¶¶ 176, 187, 189.

These "falsity" allegations do not satisfy the Reform Act. *First*, Plaintiff has failed to allege specific facts demonstrating that, when these statements were made, sales of *RR2Y* for the 2010 growing season had even begun or that the sales were in fact "materially below expectations." The allegations to the contrary are based on anecdotal accounts of two confidential witnesses, who worked not for Monsanto, but for independent seed companies. *See* AC ¶¶ 72 n.14, 73 n.15. These witnesses' opinions that "as of late 2009, farmers continued to be hesitant about purchasing [*RR2Y*]" (AC ¶ 75) and that "there was little demand" for *RR2Y* (AC ¶ 88) do not provide enough factual context to conclude that Monsanto's sales of *RR2Y* in the fall of 2009 were "materially below expectations," let alone that Monsanto's forecasts regarding seeds-and-traits profitability in 2010 and 2012, or the size of the *RR2Y* commercial launch in 2010, were "necessarily unattainable." *Hutchinson*, 536 F.3d at 959 (rejecting falsity "allegations supported by anecdotal information about specific customers with no historical context"); *Cerner*, 425 F.3d at 1085–86 (former regional sales manager's statement to personnel that forecasts were unattainable insufficient because it "shed[] no light on the relevant issue of . . . whether the forecasts were necessarily unattainable").[16]

[16] *See also Zucco Partners* v. *Digimarc Corp.*, 552 F.3d 981, 996–98 (9th Cir. 2009) (statements of confidential witnesses who were not employed by defendant during relevant period, who had no firsthand knowledge of company's finance and corporate departments, or who made only conclusory assertions, did not give rise to strong inference of scienter); *In re Nvidia Corp. Sec. Litig.*, 2010 WL 4117561, at *6 (N.D. Cal. 2010) (confidential witnesses never employed by defendant "unlikely" to have personal knowledge of whether defendants knew of allegedly undisclosed "probable loss" requiring accounting charge); *Local No. 38 IBEW Pension Fund* v. *American*

(footnote continued)

*Second*, Plaintiff fails to allege any specific facts demonstrating that *RR2Y* did not materially improve yields. Plaintiff cites a *single* report by OTR Global in late October 2009 that claimed, based on only 20 farm-manager and seed-distributor interviews, that *RR2Y* yields were materially below expectations (AC ¶ 85) and a single unnamed seed merchant's claim that the yield improvements were "marginal." AC ¶ 88. As the Complaint acknowledges, Monsanto addressed the OTR Global report in a *Bloomberg News* story dated November 10, 2009, noting that OTR's research was "flawed because of the small sample size and because half of the soybean crop hasn't been harvested." AC ¶ 86. In any event, the Complaint lacks any facts demonstrating that questions as to the yield advantage provided by *RR2Y* in October and November 2009 necessarily rendered Monsanto unable to achieve its seeds and traits gross profit projections for 2010—let alone 20*12*—or the anticipated acreage target for *RR2Y* in fiscal 2010.

*Third*, with respect to the allegedly undisclosed issue of "limited varieties," Plaintiff ignores that Begemann acknowledged at the November 10 conference that, during the pre-commercial launch of *RR2Y* in 2009, Monsanto had only "15 varieties" to sell and therefore "didn't have enough variety to get to everybody," but that for the 2010 commercial launch, Monsanto expected to have "another 50 varieties" to sell. Ex. 38 at 12.

**6. Forecasts made in connection with announcement of first quarter fiscal year 2010 results**

On January 6, 2010, Monsanto again predicted $650–$750 million gross profit for *Roundup* in 2010 and $1 billion in 2012. AC ¶¶ 201–02. Plaintiff alleges Monsanto failed to

(footnote continued)

*Express*, 724 F. Supp. 2d 447, 459–63 (S.D.N.Y. 2010) (statements of confidential witnesses who were low-level employees and outside contractors with no contact with individual defendants, or who did not allege when and how adverse data was presented to management, did not give rise to strong inference of scienter).

disclose that the September 2009 *Roundup* price cut had not increased demand. AC ¶ 203. But on the earnings call that very day, Casale stated that the "clearing of generic inventory is still under way, keeping farm gate generic prices depressed." Ex. 47 at 3. And in its 10-Q filed two days later for the first quarter ended November 30, 2009 (the quarter in which the price cut was announced), Monsanto disclosed *Roundup* net sales for that quarter were only $509 million—a *63% drop* from the $1.359 billion in the same quarter the prior year—and gross profit was only $87 million, a nearly *90% drop* from that quarter. Ex. 49 at 27, 34. Moreover, the 10-Q disclosed that, while Monsanto's glyphosate prices had decreased in 2010, its sales volumes had *declined* "due to share loss resulting from declining competitive prices and increasing competitive supply." Ex. 49 at 40. Accordingly, the effect-to-date of the September 2009 price cut on Monsanto's *Roundup* sales was fully disclosed. Of course, the results in that one quarter did not "necessarily render" Monsanto's fiscal-2010 projections unattainable—to say nothing of those for fiscal 20*12*, which was still *over two-and-a-half years away*. *Cerner*, 425 F.3d at 1084.

As for Seeds and Genomics, Plaintiff alleges forecasts of the expected size of the *RR2Y* and *SmartStax* launches were false and misleading. On January 6, 2010, Monsanto reiterated its targets for that year's commercial launches of *RR2Y* and *SmartStax*—8 to 10 million acres and 4 million acres, respectively. AC ¶¶ 204–05. Then, on February 25, Casale stated that 8 million acres of *RR2Y* and 4 million acres of *SmartStax* represented the "top end of the [forecast] range," and both launches would probably be about 20% smaller. AC ¶ 216. Plaintiff challenges these *RR2Y* launch acreage forecasts based on the same inadequate allegations discussed above. AC ¶¶ 207, 217; *see* pp. 37–38, *supra*. Plaintiff alleges that the *SmartStax* acreage forecasts were false and misleading because, according to a confidential witness, there were "material defects with certain of Monsanto's new corn seeds." AC ¶ 217. In

February 2010, this witness was supposedly advised that two *SmartStax* hybrids "failed final testing in Brazil," resulting in Monsanto replacing the seeds and providing financial incentives to farmers who got "poor yields." *Id.* This allegation of falsity is patently deficient. Plaintiff does not allege such basic facts as the portion of Monsanto's overall *SmartStax* sales affected by the alleged defect, or the effect, if any, the alleged defect had on Monsanto's ability to meet its *SmartStax* acreage forecast. The Complaint is devoid of any allegations showing that the alleged defect made that forecast "necessarily unattainable." *Cerner*, 425 F.3d at 1086.[17]

**7. Forecasts made in connection with announcement of second quarter fiscal year 2010 results**

On April 7, 2010, Monsanto issued a press release announcing results for the second quarter ended February 28, 2010, and stating that it "now sees gross profit for *Roundup* and other glyphosate-based herbicides at plus-or-minus $600 million for the year." AC ¶ 218. During an investor call that day, and in its 10-Q filed the following day, Monsanto predicted that *Roundup* would continue to be a cash-generating business. AC ¶¶ 219–20. Again, Plaintiff's claim of "falsity" rests entirely on the premise that Monsanto failed to disclose that its September 2009 *Roundup* price cut had not increased demand. AC ¶ 221. But Monsanto's 10-Q disclosed that in the first six months of fiscal 2010—the period of the price cut—*Roundup*/glyphosate made only $86 million on net sales of only $974 million. Ex. 59 at 38. Moreover, the 10-Q explained that the "significant supply of lower priced generics has caused increased competitive pressure . . . and a *decline in the business due to our previously announced price reduction*" and

[17] Plaintiff also alleges that Monsanto's January 6 projection that its fiscal 2010 EPS "would be in the range of $3.10–3.30" was "false" because Monsanto failed to disclose that its September 2009 *Roundup* price cut had not increased demand. AC ¶¶ 201, 203. As already shown (p. 39), the effect of the price decrease on *Roundup* sales in the first quarter of 2010 was disclosed. In any event, Plaintiff has not alleged facts demonstrating that this allegedly undisclosed fact "necessarily rendered [Monsanto] unable to achieve its projec[tion]." *Cerner*, 425 F.3d at 1084.

that "our glyphosate volumes declined [in 2010] due to share loss resulting from declining competitive prices and increasing competitive supply." Ex. 59 at 33, 46 (emphasis added). It was thus apparent to investors that the September 2009 price cut had not yet increased demand sufficiently to offset the effect of lower prices. And putting aside that it was disclosed, none of this information rendered Monsanto's revised *Roundup*/glyphosate gross profit projection of "plus-or-minus $600 million" for 2010 "necessarily unattainable." *Cerner*, 425 F.3d at 1086.

**B. To the extent the Complaint refers to current facts rather than forward-looking statements, there is no allegation of falsity at all.**

The overwhelming bulk of Plaintiff's allegations address forward-looking statements. As to the few statements not in that category, there is no allegation of falsity *at all*, let alone the pleading of specific facts necessary to satisfy the Reform Act. Thus:

1. Plaintiff challenges a statement by Crews on January 7, 2009 that Monsanto expected "to see solid growth in our U.S. seeds and traits business" based in part on "orders improving and the pace of orders picking up in December and January." AC ¶ 114. But there is no allegation that orders did not "pick[] up in December and January." In fact, as noted (p. 31), the Seeds and Genomics segment earned $4.5 billion in gross profit for 2009, an all-time record.

2. Plaintiff alleges that in an April 2, 2009 press release, Monsanto falsely attributed lower glyphosate volumes for the second quarter (as compared to the prior year) to customers in the prior year having accelerated purchases due to a pre-announced price increase. AC ¶ 127. Plaintiff misreads the release, which stated that the lower *Roundup* volumes were "*largely*" the result of that effect, but also of "drought conditions in Latin America." Ex. 17 at 6. The Complaint does not allege any facts demonstrating customers did not accelerate purchases in the prior year ahead of the pre-announced price increase, or that the 2009 drought did not affect glyphosate sales. And as discussed above (pp. 30–31), Monsanto did not hide the effect that

generic glyphosate was having on *Roundup*. Indeed, on the April 2 earnings call, Crews predicted *Roundup*/glyphosate sales volume would decline by 30 million gallons in 2009 due, in part, to price competition from generic suppliers, and cautioned that the glyphosate business was "likely to become more competitive as we move through this fiscal . . . year [a]s both we and the Chinese will bring more volume on-line and a supply/demand squeeze unwinds." Ex. 18 at 4.

3. In its June 24, 2009 press release, Monsanto estimated that "farmers [were] using the [*RR2Y*] trait on approximately 1.4 million to 1.5 million acres [that] season," and stated it "believe[d] that customer demand for its branded corn seed products [had] contributed to an eighth consecutive year of share gains in U.S. corn seed sales." AC ¶ 142. Plaintiff nowhere claims these estimates were false or that customer demand did not contribute to share gains. Instead, Plaintiff complains Monsanto did not disclose that the *RR2Y* launch "was a failure because Defendants could not sell the new seeds at premium prices." AC ¶ 143. But the complained-of statements make no representations about the price of *RR2Y*. *See Detroit Gen.* v. *Medtronic*, 621 F.3d 800, 806 (8th Cir. 2010) (falsity requirement unmet where undisclosed information is "not inconsistent with [company's] statements to the public"). In any event, Plaintiff alleges no specific facts demonstrating that Monsanto failed to sell the *RR2Y* trait at premium prices in 2009.

4. Plaintiff complains of a Monsanto executive's statements on December 8, 2009 that "in a challenging weather year without much stress, both our *SmartStax*, our [*RR2Y*] products and our core genetics delivered great performance" and that "[*RR2Y*] meets our requirements, and has delivered exceptional performance." AC ¶¶ 196–97. As shown below (pp. 43–44), these statements are inactionable puffery. Plaintiff also alleges in conclusory fashion that Monsanto's representation that *RR2Y* had a yield advantage of more than 7% over

prior-generation soybean seeds was false. *Id.* This allegation is inadequate given the absence of specific facts to show falsity. *Elam* v. *Neidorff*, 544 F.3d 921, 927 (8th Cir. 2008) (affirming dismissal where plaintiff failed to allege any "specific fact" that would demonstrate falsity).

5. In its January 6, 2010 press release, Monsanto stated that "[d]elays in harvesting last year's soybean crop have put the company's seed shipments slightly behind, with this volume expected to shift into the second quarter." AC ¶ 204. Plaintiff claims that Defendants failed to disclose that *RR2Y* sales were materially below expectations because the new seeds were too expensive, did not improve yields and were sold in limited varieties (AC ¶ 207), but Plaintiff fails to allege facts showing there was no delay in harvesting soybeans in late 2009 after the "wettest fall in 120 years" (Ex. 38 at 21), or that this delay did not affect soybean sales generally or *RR2Y* sales specifically. Plaintiff also ignores the disclosures Monsanto had already made regarding issues surrounding the *RR2Y* launch. *See* p. 31, *supra*.

## POINT III

## MONSANTO'S STATEMENTS OF CORPORATE OPTIMISM THROUGHOUT 2009 AND 2010 ARE INACTIONABLE "PUFFERY."

Many of Plaintiff's allegations are predicated on expressions of optimism too vague to support a fraud claim. Because "the market price of a share is not inflated by vague statements predicting growth," the Court of Appeals has held immaterial as a matter of law "soft, puffing statements" and "hyperbole that no reasonable investor would rely upon." *Hutchinson*, 536 F.3d at 960–61 (quoting *Parnes*, 122 F.3d at 547). Thus, in *Panera*, this court found non-actionable statements that Panera was "on track" to meet earnings targets, that a product launch was "progressing more rapidly than planned," and that management felt "very, very good about the robust growth [Panera was] experiencing." 697 F. Supp. 2d at 1094 & n.5, 1095.

The Complaint is replete with examples of non-actionable puffery:

- On February 10, 2009, Crews stated: "We've had a great start to our 2009 year. We're comfortable that we're still staying on that trajectory." AC ¶ 120; *see Panera*, 697 F. Supp. 2d at 1095 (E.D. Mo. 2010) (reference to "our very robust start to this year" is puffery).

- On an April 2, 2009 call, Monsanto stated "[g]rowers have steadily been buying our higher performing higher value soybean products." AC ¶ 129; *see Panera*, 697 F. Supp. 2d at 1094 & n.5 (statement that "the gradual introduction of [a new product] is progressing more rapidly than planned" is puffery).

- On September 10, 2009, Casale stated *RR2Y* was a "game changing technology." AC ¶ 166; *see In re NVE Corp. Sec. Litig.*, 551 F. Supp. 2d 871, 895–96 (D. Minn. 2007) (statements calling particular technology under development "the Holy Grail of memory" and "the type of technology that occurs once in a lifetime" are puffery), *aff'd*, 527 F.3d 749 (8th Cir. 2008).

- On September 10, 2009, Casale also stated *Roundup* is "positioned very well," "we are still on track to double our gross profit of this business by 2012, which we set out to do in 2007," and Monsanto is "very well poised" to do so. AC ¶¶ 163–64; *see Hutchinson*, 536 F.3d at 960 ("[w]e believe we are well positioned on a number of new disk drive programs" is puffery); *Panera*, 697 F. Supp. 2d at 1095 (company "on track" to meet earnings targets is puffery).

These and similar allegations in the Complaint are non-actionable puffery.[18]

**POINT IV**

**THE COMPLAINT FAILS TO RAISE A STRONG INFERENCE OF SCIENTER.**

A plaintiff must also allege particularized facts giving rise to a "strong inference" that the defendant acted with scienter. 15 U.S.C. § 78u-4(b)(2)(A); *Navarre*, 299 F.3d at 742. A complaint "may not rest on mere allegations that fraud has occurred." *Cerner*, 425 F.3d at 1083. The Court must "disregard catch-all or blanket assertions [of fraud] that do not live up to the particularity requirements of the statute." *Amdocs*, 390 F.3d at 547. Moreover, the Supreme Court's decision in *Tellabs* "added an additional hurdle for . . . plaintiffs to overcome." *In re*

[18] *See also, e.g.*, AC ¶¶ 111, 117, 124, 125, 129, 131–33, 135, 152, 156, 182, 183, 188, 190, 204–06, 208, 210, 212, 215, 219, 220.

*Ceridian Corp. Sec. Litig.*, 542 F.3d 240, 244 (8th Cir. 2008). "Not only must a plaintiff state with particularity facts giving rise to an inference of scienter that is strong when viewed in isolation, the inference 'must be more than merely plausible or reasonable—it must be cogent and *at least as compelling as any opposing inference of nonfraudulent intent*.'" *Id.* (quoting *Tellabs*, 551 U.S. at 314) (emphasis in *Ceridian*). Plaintiff fails to overcome either hurdle: the Complaint's allegations do not give rise to a "strong inference" of scienter even when "viewed in isolation," and the "opposing inference[s] of nonfraudulent intent" are far more "compelling."

The Complaint does not allege that any defendant had any *motive* to make misleading statements. There is no claim of insider trading or the like. Plaintiff's sole theory of scienter is that Defendants "knew or were severely reckless in disregarding that the public documents and statements issued or disseminated in the name of Monsanto were materially false and misleading." AC ¶ 261; *see* AC ¶¶ 256–57. In the absence of motive, allegations of scienter must "'be particularly strong in order to meet the Reform Act standard.'" *In re K-Tel Int'l, Inc. Sec. Litig.*, 300 F.3d 881, 894 (8th Cir. 2002). The allegations of scienter here are very weak.

Plaintiff's allegations of "severe recklessness" are plainly insufficient to allege scienter with respect to any of the forward-looking statements alleged to be false. The Reform Act establishes an "actual knowledge" standard of scienter for such statements. 15 U.S.C. § 78u-5(c)(1)(B); *Yellen*, 437 F. Supp. 2d at 951, 958 (dismissing complaint where allegations did not give rise to a "*strong* inference that Defendant *actually knew* that its earnings projections . . . lacked a reasonable basis") (emphasis in original). And as to the handful of alleged misstatements of current fact, Plaintiff's allegations must at least demonstrate "severe recklessness"—"'*highly unreasonable* omissions or misrepresentations' amounting to 'an *extreme departure from the standards of ordinary care*, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it.'" *Kushner*, 317 F.3d at 828 (emphasis added). The Complaint fails to plead particularized facts giving rise to a "strong inference" of scienter under either standard.

*First*, the Complaint does not even attempt to plead *any* Defendant's state of mind. Instead, Plaintiff's "knowledge"/"recklessness" allegations are cast against Defendants as a group—with no showing of what any Defendant thought at any time. *See, e.g.*, AC ¶¶ 113, 121, 123, 126. This defect is fatal. *See, e.g.*, *Horizon Asset Mgmt.* v. *H&R Block*, 580 F.3d 755, 761 (8th Cir. 2009) (plaintiff must "raise a strong inference of scienter *for each defendant* and with respect to *each alleged misrepresentation*") (emphasis added); *Kushner*, 317 F.3d at 827 (rejecting "blanket assertion" that defendants "had actual knowledge of the misrepresentation").

*Second*, the conclusory allegations fail to demonstrate that Monsanto's projections were "necessarily unattainable," so they likewise cannot "establish a strong inference that the [forecasts], even if false, [were] issued with the requisite scienter." *Cerner*, 425 F.3d at 1086.

*Third*, the Complaint lacks particularity in that it fails to plead precisely *what* contradictory information any Defendant had or *when* or *how* he learned it. Indeed, the Complaint fails to cite *any* internal Monsanto report or statement that even arguably contradicts any of the Defendants' public statements. This, too, is a fatal defect. *See Elam*, 544 F.3d at 929–30 (rejecting scienter allegation that "information [contradicting public statements] must have existed and must have been known" because it related to "core operations"); *Kushner*, 317 F.3d at 828–29 (rejecting scienter allegation absent showing that defendants knew "contradictory crucial information at the time that they made their statements"); *NVE*, 551 F. Supp. 2d at 886–87 ("'Where plaintiffs contend defendants had access to contrary facts, they must specifically identify the reports or statements containing this information.'").

*Fourth*, in an effort to mask the weakness of its fraudulent-intent allegations, the Complaint relies heavily on anecdotes of several so-called "confidential informants"—a few customers and former low-level employees. These allegations, too, fail.[19]

The three anonymous alleged Monsanto customers (CI 2, 9, and 10, *see* AC ¶¶ 47, 72–73) are not even alleged to have spoken to any Individual Defendant, so it is unfathomable how such allegations can support a "strong inference" of scienter. The conclusory allegations, based on anecdotal observations, that the "trial roll-out of [*RR2Y*] in the spring of 2009 was a major disappointment" (AC ¶ 72), or that Monsanto was losing "market share" (AC ¶ 77), are neither cogent nor compelling given the absence of any allegation that would permit generalizing these customers' narrow personal perspectives to the Company as a whole. *See Hutchinson*, 536 F.3d at 959 (rejecting scienter allegations based on "anecdotes offered by" confidential witnesses "about specific plants and specific customers"); *see also Amdocs*, 390 F.3d at 549–50 (complaint failed "[w]ithout any allegations regarding the effect that these compartmentalized conditions had on the *overall* demand and visibility experienced by [company]") (Wollman, J., concurring).

The allegations based on information supposedly provided by anonymous former Monsanto low-level employees are equally unavailing. None of them is claimed to have had involvement in any statement alleged to be misleading, or even to have discussed any such statement with any Individual Defendant.[20] So *even if* each had knowledge of "facts" attributed to them in the Complaint, this cannot satisfy Plaintiff's burden to plead facts establishing scienter of *the Individual Defendants*. *See Hutchinson*, 536 F.3d at 960 ("general impressions shared by lower-level employees and contractors" "not enough to show that the defendant's representations about strong demand were false"); *Kushner*, 317 F.3d at 828 (allegation that employee with alleged knowledge of falsity reported to one of the defendants insufficient to plead scienter).

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[19] It is doubtful whether reliance on such confidential informants can ever give rise to a "strong inference" of scienter after *Tellabs*. As the Seventh Circuit has held, "[o]ne upshot of the approach that *Tellabs* announced is that [a court] must discount allegations" attributed to confidential witnesses and "[u]sually that discount will be steep." *Higginbotham* v. *Baxter Int'l*, 495 F.3d 753, 756–57 (7th Cir. 2007). "It is hard to see how information from anonymous sources could be deemed 'compelling.'" *Id.* at 757.

[20] Even the two confidential informants who are alleged to have been associated with Monsanto's finance department are not alleged to have had any role in the preparation of the Company's forecasts. *See* AC ¶ 57.

Although the Complaint alleges some Individual Defendants participated in so-called "town hall" meetings, it fails to allege with any particularity precisely *what* was said at any such meeting. Instead, the Complaint lumps nearly every town hall meeting during the Class Period—alleging, for example, that they generally took place "three days after" earnings announcements, AC ¶ 11, and that "concerns about negative trends in Monsanto's glyphosate business" were aired. AC ¶ 56; *see also* AC ¶ 16. But without a more particularized discussion of *what* was said, *by whom*, *at which meeting*—and *how* those statements contradicted public forecasts—these allegations do not begin to plead scienter under the Reform Act.[21]

Plaintiff also alleges two Monsanto sales managers told CI 8 in September 2009 that fiscal-2010 glyphosate sales projections were "unrealistic." AC ¶ 68. But it does not plead that any *Individual Defendant* shared this view. Accordingly, this allegation fails.[22]

Plaintiff's *only* allegation of a conversation between a confidential informant and an Individual Defendant is patently insufficient. *See* AC ¶ 63. It alleges Crews told CI 3, in a private conversation before a June 2009 "town hall," that Monsanto's leadership had been aware of *Roundup* inventory build-up and declining sales "for a while." But the Complaint fails to specify *when* or *how* the "leadership" became so aware, *who* in "leadership" knew, or how such "knowledge" rendered any Defendant's statement false or misleading. To the contrary, on June 24—three days *before* that "town hall"—Monsanto disclosed a "supply/demand imbalance" in the glyphosate market had resulted in a 28-million-gallon drop in sales volume and a 54% drop in *Roundup* gross profit for third-quarter 2009 compared to the prior year's quarter. Ex. 26 at 2, 6.

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[21] *See, e.g.*, *Goplen* v. *51job*, 453 F. Supp. 2d 759, 768 (S.D.N.Y. 2006) (allegation that officers and directors had access to adverse information through internal meetings insufficient to show scienter where plaintiff failed to identify specific meetings that were the source of specific information).

[22] *See, e.g.*, *Cornelia I. Crowell GST Trust* v. *Possis Med.*, 519 F.3d 778, 782–83 (8th Cir. 2008) (anonymous testimony of former employees "fail[ed] to provide meaningful support" to "scienter allegation" where no allegation "executives actually making the allegedly false or misleading statements had heard" trial result "rumors"); *Cerner*, 425 F.3d at 1086 ("At best, this allegation establishes that such an opinion was held by the regional sales manager and his peers. It sheds no light on the relevant issue of whether the Individual Defendants shared this view . . . .").

Finally, under the second *Tellabs* "hurdle," the Court "must consider . . . not only inferences urged by the plaintiff . . . but also competing inferences rationally drawn from the facts alleged." *Tellabs*, 551 U.S. at 314. The facts alleged provide "plausible non-culpable explanations for the defendant's conduct" far more compelling than any inference of fraudulent intent. *Id.* at 324. The Complaint itself acknowledges that, over the 16-month Class Period, Monsanto repeatedly reduced its forecasts in response to deteriorating market conditions. And each time, it warned the investing public of the risk that even the revised forecasts might not be achieved. No one at Monsanto is alleged to have profited from the alleged "fraud."

The far more compelling inference is that Monsanto and senior executives were slow to apprehend the profound structural changes occurring in the glyphosate market as Chinese suppliers flooded it with generics priced below cost and others cut branded prices. Monsanto misjudged its ability to maintain premium pricing for *Roundup*, the most successful herbicide ever, in light of that competition.[23] But misplaced optimism is not securities fraud. *See In re*

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[23] Plaintiff alleges Monsanto's repositioning of *Roundup* on May 27, 2010, less than two months after projecting that it would make "plus-or-minus $600 million" in fiscal 2010, shows that Monsanto knew its April 2010 forecast was false. AC ¶ 221. But, as this Court held in *Elam* v. *Neidorff*, 502 F. Supp. 2d 988, 995 (E.D. Mo. 2007):

(footnote continued)

*Carter-Wallace, Inc., Sec. Litig.*, 220 F.3d 36, 42 (2d Cir. 2000) ("'[M]isguided optimism is not a cause of action, and does not support an inference of fraud.'"). Plaintiff "has offered a weak collection of allegations that amount at most to fraud by hindsight." *Yellen*, 437 F. Supp. 2d at 958. Dismissal is required.[24]

**CONCLUSION**

For the foregoing reasons, the Complaint should be dismissed in its entirety.

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(footnote continued)

"Temporal proximity may give rise to suspicion, but I do not believe it gives rise to a reasonable inference." The Court of Appeals affirmed on that precise point. *Elam*, 544 F.3d at 930.

24 Just as Plaintiff's scienter allegations are inadequate as to the Individual Defendants, they are inadequate as to Monsanto. Plaintiff does not allege any senior officer not named as a defendant intended to defraud such that his scienter could be imputed to the Company. *See Horizon*, 580 F.3d at 767. Plaintiff also alleges a violation of Section 20(a) by the Individual Defendants as "control persons" of Monsanto. AC ¶¶ 267–73. However, to state such a claim, Plaintiff must first plead an actionable primary violation of Section 10(b) by the Company. *See Navarre*, 299 F.3d at 748. Since Plaintiff has failed to do so, its Section 20(a) claim against the Individual Defendants must be dismissed. *See, e.g.*, *id.*; *Horizon*, 580 F.3d at 767.

* Brian Bolin, a law clerk of the Firm not yet admitted to the Bar, participated in the preparation of this brief.

## CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on April 1, 2011, the foregoing **Memorandum of Law** was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filings to counsel of record.

/s/ Stephen H. Rovak